

Docket No. 157,052

Claimant appeals from an Award entered by Special Administrative Law Judge William F. Morrissey dated October 12, 1994. Appeals Board Member Pro Tem Ernest L. Johnson will serve in place of Appeals Board Member Gary M. Korte who has recused himself from this proceeding.

Claimant appeared by his attorney, Gary L. Jordan of Ottawa, Kansas. The self-insured respondent appeared by its attorney, Paula Greathouse of Emporia, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Diane F. Barger of Emporia, Kansas. There were no other appearances.

The record considered by the Appeals Board is enumerated in the Award of the Special Administrative Law Judge.

The stipulations of the parties listed in the Award of the Special Administrative Law Judge are adopted by the Appeals Board for this review.

## ISSUES

The Administrative Law Judge found claimant entitled to permanent partial general body disability benefits based upon a fifty-one percent (51%) work disability. The Special Administrative Law Judge wrote that he gave approximately equal weight to the opinions of the vocational experts. He found that claimant suffers a fifty percent (50%) loss in his ability to perform work in the open labor market and a fifty-two percent (52%) loss of ability to earn a comparable wage, then gave each loss equal weight in determining the fifty-one percent (51%) disability. The claimant requests the Appeals Board to review the finding of the nature and extent of disability.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record and considering the arguments of parties, the Appeals Board finds and concludes:

(1) For the reasons expressed below, claimant is entitled to receive benefits based upon a seventy-two percent (72%) permanent partial general body disability as a result of his work-related injury of May 30, 1991.

The Special Administrative Law Judge found that claimant suffered a fifty-one percent (51%) permanent partial general body disability. Claimant argues that a greater work disability should have been awarded. Respondent argues that the award should be reduced, alleging that the claimant willfully failed to complete a vocational rehabilitation plan and was reluctant to return to work. The respondent also argues that, if claimant is entitled to work disability, the work disability assessment of respondent's expert is more reasonable than that of claimant's expert.

The Appeals Board is satisfied that claimant has met his burden of proof that he was unable to perform the duties of his manual-labor job for the respondent. Further, claimant's evidence supports the conclusion that he did comply with the requirements of his vocational rehabilitation plan. The plan was simply not successful.

Claimant testified that he sustained an injury to his low back with radiating pain into his left leg which resulted when he bent down to lift a piece of meat to put in a box. No treating doctor was deposed, but the records of John J. Wertzberger, M.D. were admitted by stipulation of the parties. Dr. Wertzberger indicated that claimant suffers a ten percent (10%) permanent partial general body impairment in function due to diffuse degenerative disc disease. Further, the medical records support a finding that the claimant was restricted by his injuries to doing sedentary work. The presumption against work disability found in K.S.A. 1990 Supp. 44-510e does not apply. The vocational testimony substantiates a significant work disability.

Claimant argues that the work disability determined by the Special Administrative Law Judge was not great enough. The Appeals Board agrees. The Special Administrative Law Judge took into account and stated that he gave equal weight to the opinions of the two (2) testifying vocational rehabilitation experts. However, even the average of those opinions, when adjusted to conform to the testimony, comes out differently than the fifty-one percent (51%) found by the Special Administrative Law Judge.

The Special Administrative Law Judge found that claimant's expert, Mr. Monty Longacre, assessed a loss of eighty-four percent (84%) of claimant's ability to perform work in the open labor market. The Special Administrative Law Judge indicated that respondent's expert, Mr. Maurice Entwistle, determined that claimant had lost forty-one percent (41%) of his ability to perform work in the open labor market. However, Mr. Entwistle purportedly reduced that loss to twenty percent (20%) in light of the new skills claimant acquired in his vocational rehabilitation computer courses. The Special

Administrative Law Judge, giving equal weight to those assessments, found that claimant suffered a fifty percent (50%) loss in his ability to perform work in the open labor market.

Claimant correctly points out that, while Mr. Entwistle may have employed the numbers cited by the Special Administrative Law Judge in a written report, Mr. Entwistle drastically modified his findings on cross-examination by claimant's attorney. Mr. Entwistle acknowledged in his testimony that, on applying the restrictions imposed by Dr. Wertzberger, the claimant's loss of ability to perform work in the open labor market might vary between sixty-nine percent (69%) and ninety-six percent (96%).

The Appeals Board finds that the more credible testimony was given by Mr. Longacre, who personally interviewed the claimant and who more properly applied the claimant's physical restrictions to his analysis of labor market access. Accordingly, the Appeals Board finds that claimant has lost eighty-four percent (84%) of his ability to perform work in the open labor market.

The claimant also asserts that the Special Administrative Law Judge erred in determining claimant's loss in ability to earn comparable wages. The Special Administrative Law Judge compared the stipulated average weekly wage at the time of accident, \$496.54, to a present earning capacity of \$240.00 per week and found a fifty-two percent (52%) percent loss in ability to earn comparable wages. It appears the Special Administrative Law Judge averaged the opinions of the two vocational experts concerning claimant's wage loss or otherwise used some combination of figures to arrive at his conclusion. We cannot find a specific reference to the two hundred forty dollars (\$240.00) per week figure nor does the Special Administrative Law Judge explain how he arrived at that number.

Claimant had obtained, on his own effort, employment with Emporia High School for the school year only. He was paid at a rate of \$6.33 per hour for thirty (30) hours per week during the school year, or \$189.90 per week. He also obtained part-time work in the summer for the school district at a lesser wage.

On the facts in this case, the Appeals Board finds that the stipulated weekly wage at the time of accident, \$496.54, should be compared to a present earning capacity of \$189.90 per week, the amount Mr. Longacre testified claimant retained the ability to earn. This results in a sixty-two percent (62%) loss in ability to earn comparable wages.

Although the Appeals Board is not required to equally weigh loss of access to the open labor market and loss of ability to earn a comparable wage, there is no compelling reason in this case to give either factor a greater weight. Therefore, the Appeals Board averages both losses and finds claimant has sustained a seventy-three percent (73%) permanent partial general disability in accordance with K.S.A. 1990 Supp. 44-510e. This statute provides:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment."

(2) The Appeals Board adopts the findings and conclusions set forth by the Special Administrative Law Judge in his Award dated October 12, 1994, that are not inconsistent with those expressed herein.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey dated October 12, 1994, shall be, and hereby is, modified as follows:

**AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR**, of the claimant Jerome A. Francis, and against the respondent IBP, Inc., a qualified self-insured, and the Kansas Workers Compensation Fund for an accidental injury which occurred May 30, 1991, and based on an average weekly wage of \$496.54, for 95 weeks of temporary total disability compensation at the rate of \$278.00 per week in the sum of \$26,410.00 and 320 weeks of compensation at the rate of \$241.63 per week in the sum of \$77,321.60 for a 73% permanent partial general body work disability making a total award not to exceed \$100,000.00.

As of December 20, 1995, there is due and owing claimant 95 weeks of temporary total disability compensation at the rate of \$278.00 per week in the sum of \$26,410.00, followed by 142.86 weeks permanent partial disability compensation at the rate of \$241.63 in the sum of \$34,519.26, for a total of \$60,929.26 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$39,070.74 is to be paid for 161.70 weeks at the rate of \$241.63 per week, until fully paid or further order of the Director.

The orders of the Special Administrative Law Judge that are not inconsistent with the above are hereby adopted by the Appeals Board as its own.

Future medical benefits will be awarded only upon proper application to and approval of the Director.

All compensation, medical expense and costs are to be borne 40% by the respondent and 60% by the Kansas Workers Compensation Fund.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

Fees necessary to defray the expenses of the administration of the Workers Compensation Act are hereby assessed 40% to the respondent and 60% to the Kansas Workers Compensation Fund to be paid direct as follows:

William F. Morrissey Special Administrative Law Judge	\$150.00
Appino & Biggs Reporting Service Transcript of Regular Hearing	\$236.00
Deposition of Maurice Entwistle	\$189.60
Owens, Brake & Associate Deposition of Monty Longacre	\$272.30

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of December 1995.

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BOARD MEMBER

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**BOARD MEMBER**

c: Gary L. Jordan, Ottawa, Kansas  
IBP Legal Division, Dakota City, Nebraska  
Diane F. Barger, Emporia, Kansas  
William F. Morrissey, Special Administrative Law Judge  
Philip S. Harness, Director